IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 206

GUADALUPE R. GALLEGOS and FRANCESCA GALLEGOS, his wife, and INGA G. GUDMUNDSEN, in their own behalf and in behalf of others similarly situated and HARRY W. HILL, Receiver of Intermountain Building & Loan Association, a corporation,

Petitioners,

vs.

LLOYD R. SMITH, Corporation Commissioner of the State of Oregon,

Respondent.

Upon Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

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GUADALUPE R. GALLEGOS and FRANCESCA GALLEGOS, his wife, and INGA G. GUDMUNDSEN, in their own behalf and in behalf of others similiarly situated and HARRY W. HILL, Receiver of Intermountain Building & Loan Association, a corporation,

Petitioners,

vs.

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Respondent.

Upon Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Guadalupe R. Gallegos and Francesca Gallegos, his wife, and Inga G. Gudmundsen, in their own behalf and in behalf of others

similarly situated and Harry W. Hill, Receiver of Intermountain Building & Loan Association, a corporation, respectfully present this their petition for a writ of certiorari addressed to the United States Circuit Court of Appeals for the Ninth Circuit for the review and determination in this court of that certain cause in said Circuit Court of Appeals wherein your petitioners were appellants and Lloyd R. Smith, Corporation Commissioner of the State of Oregon, was appellee, in which cause said Circuit Court of Appeals affirmed a decree of the District Court of the United States for the District of Oregon, dismissing the bill of complaint and suit of petitioners in said District Court. The suit so dismissed sought a determination of the rights of petitioners and others similarly situated in the Oregon properties of a Utah Building and Loan Association and the appointment of receivers in aid of a primary receiver appointed by the United States District Court for the District of Arizona in accordance with a decree of such Arizona District Court providing for the liquidation of all of the assets of said corporation wherever located for the equal benefit of all certificate holders without preference to or discrimination against any certificate holders because of their residence.

OPINION OF THE COURT BELOW

The Circuit Court of Appeals opinion has not as yet appeared in the Federal Reporter Advance Sheets. Its date is May 9, 1940.

JURISDICTION

This court has jurisdiction to review the judgment and decree as rendered below under Section 240a of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938) and under Rule 38 of the Revised Rules of this Court, effective February 27, 1939. The date of the judgment and decree of the Circuit Court of Appeals sought to be reviewed is May 9, 1940. An order was made staying issuance of mandate to and including July 9, 1940.

STATUTES INVOLVED

The constitutional provisions and statutes involved are Article IV, Sections 1 and 2, Article I, Sections 8 and 10, Article VI, and the Fourteenth Amendment to the Constitution of the United States, as well as Oregon Laws 1931, Chapter 373, Section 63, Page 775 (Oregon Code Ann. 1935 Supp. Sec. 25-3,104) and Oregon Laws 1935, Chapter 176, Page 252 (Or. Code Ann. 1935 Supp. Sec. 25-3,101), Oregon Laws 1931, Ch. 373, Sec. 57 (Or. Code Ann. 1935 Supp. Sec. 25-398) and Or. Code Ann. 1930, Sec. 25-316.

SUMMARY STATEMENT OF MATTER INVOLVED

Most of the facts were stipulated. References herein to "stipulation page—" refer to pages of the printed record.

Intermountain Building & Loan Association, hereinafter called Intermountain, is an insolvent

Utah corporation. During its existence it sold in various states, including Utah, Arizona, California and Oregon (153) savings certificates by which it agreed, in consideration of the payment of fixed monthly installments for 126 months, to pay to the purchasers the matured value of such certificates. Each certificate also provided that the holder could borrow against it or cash it in at any time at the cash surrender rates stated in the instrument. (Complaint 10-14, 150-152).

For the most part these certificates contained a security clause reading as follows (Complaint 12, 150-152):

> "Security. As security for the performance of the obligations of the Association hereunder, the Association will hold intact, subject to the constant examination and inspection of the banking department of the State of Utah, first mortgages on improved real estate in an amount equal to at least one hundred per cent of its liabilities hereunder, less the amount of any loans made on this and like certificates or any certificates issued in lieu thereof."

Intermountain was licensed to do business in Oregon in 1924, at which time the only Oregon statute on the subject required foreign building and loan associations to keep on deposit with some responsible trust company or authorized officer of the state of their incorporation securities of the value of $100,000.00 in trust for all its members and creditors. (Oregon Code Annotated 1930, Section 25-316.) In

compliance with this section Intermountain, at the time of its admission into Oregon, filed with the Oregon Corporation Commissioner a certificate of the State Treasurer of the State of Utah that it had deposited with that officer securities in an amount slightly in excess of $100,000.00. (139-140).

Following its admission into Oregon Intermountain sold certificates to investors on which the latter paid to it $220,966.96. (153). All of the certificates sold to Oregon investors contained the security clause heretofore quoted except nine certificates on which the aggregate amount paid by the investors was $4,657.00. (100). All certificates sold to Oregon residents were sold prior to the 6th day of June, 1931 (effective date of a statute providing for a deposit with the Oregon Corporation Commission and a preference for Oregon investors) except seven certificates on which the total payments amounted to $108.50. (142).

Effective June 6, 1931, Chapter 373 Oregon Laws 1931, Section 63, p. 775 (Oregon Code Ann. 1935 Supp. Sec. 25-3,104) requires foreign building and loan associations to deposit with the Oregon Corporation Commissioner $100,000.00 in cash or securities with power given the Commissioner to require additional deposits. The same section also provides that the deposits shall be held as security until all claims of Oregon residents against the associations have been fully paid. (See appendix for text).

No such deposit was made by Intermountain until September, 1933. At that time the Corporation Commissioner, having information of a suit brought in Arizona (where approximately one-third of the business of Intermountain was done (153)) and also that the condition of Intermountain was "very, very bad" (243), peremptorily demanded a deposit of $100,000.00 face value of mortgages, which was made. In October, 1933, on a further demand from him, an additional $100,000.00 face value of mortgages was deposited with him. (141).

The suit in Arizona was brought in April, 1933, in the United States District Court by four holders of certificates containing the security clause. They alleged that Intermountain had been insolvent for more than seven years (Ex. 1, P. 20). They further alleged corporate mismanagement in the interest of a rival corporation (Ex. 1, P. 20), that the appointment of a receiver was necessary to preserve the assets of the corporation and they prayed for themselves and all others similarly situated for a decree that the assets of the corporation were a trust fund to be held for the benefit of all holders of certificates containing the security clause, and that they and others similarly situated be decreed to have a lien on all of the real estate mortgages of the corporation in accordance with the security clause. (Ex. 1, P. 28-33).

Eleven months after this suit was started the Bank Commissioner of Utah undertook to take pos-

session of the Arizona assets of the corporation and required the corporation to, and it did, make transfers thereof to him. He also sought to intervene in the suit but permission was denied him. In April, 1934, a receiver was appointed and the corporation and the Utah Bank Commissioner thereupon appealed to the Circuit Court of Appeals for the Ninth Circuit.

That court, in a decision found in 78 Fed. (2nd) 972, affirmed the appointment of the receiver, holding that the certificate holders were contract lien creditors, the District Court was empowered to appoint a receiver, and that the Utah Bank Commissioner had not acted with sufficient diligence in his tardy attempt to liquidate the corporation and the appointment of the receiver was therefore proper. Certiorari was denied by this court. 296 U. S. 639.

Final decree was entered in the Arizona case in January, 1937. This decree established a contract lien against all of the assets of the corporation as of the date of filing the suit (April 18, 1933) in favor of the holders of certificates containing the security clause (118-119), made the receivership permanent to liquidate the corporation, vested the receiver with title to all its assets wherever situated (119), ordered the corporation to make all transfers necessary to vest such title in the receiver (120), decreed all of the assets of the corporation a trust fund to secure its obligations to the named plaintiffs and other lien holding creditors similarly situated (121), appointed

the receiver as a trustee to execute the trust (121), and enjoined all persons from interfering with the possession of the receiver or his liquidation of the corporation. (122). No appeal was taken from this decree.

On March 19, 1934 (16 days before the application for a receiver in the Arizona suit) the Oregon Corporation Commissioner took possession of the assets of Intermountain in Oregon acting under the power given him by Oregon Laws 1931, Chapter 373, Section 57, Page 771 (Oregon Code Ann. 1935 Supp. Sec. 25-398) which confers power on him to take possession of building and loan associations and operate them (48). He did not then and up to the time of trial of this cause in 1937 had not started liquidation of the corporation or undertaken to comply with the provisions of the Oregon law relating to liquidation of such corporations. Oregon Code Ann. 1935 Supp. Sec. 25-3,101.

The present suit was instituted by two certificate holders who were among the plaintiffs in the Arizona suit and by the Arizona receiver against the then Corporation Commissioner of the State of Oregon. Respondent is the present Commissioner. The complaint alleges the existence of the corporation, its sale to the plaintiff certificate holders of certificates containing the security clause, its default in payment, its insolvency (18), asserted all of the corporation's assets were a trust fund for the equal benefit of all like certificate holders (21-22) and that

such certificate holders had a lien on such assets. (22). It alleged the proceedings in the Arizona case and asserted that thereby it had been judicially determined that these assets were a trust fund for the equal benefit of all contract lien holders (28) and prayed for a decree establishing such a lien, and for the appointment of ancillary receivers in aid of the Arizona receiver (39), and that the Corporation Commissioner be required to turn over to the ancillary receivers all of the corporation's assets in his hands. (40).

To this complaint the Corporation Commissioner answered generally denying knowledge of most of the allegations and alleging that he had taken possession of the corporation by virtue of the power conferred on him by Section 57 of Chapter 373, Oregon Laws 1931, previously referred to (48), admitted that Intermountain had been insolvent "for some time" (57), denied the necessity for an ancillary receivership (59) and alleged that he would ultimately distribute the assets of the corporation in his hands in accordance with the laws of Oregon (65), and prayed that he be authorized to continue operation, control and liquidation of Intermountain's assets in Oregon, first for the benefit solely of members and shareholders residing in Oregon, and then if any residue remained after the claims of Oregon shareholders, creditors and members had been satisfied in full to dispose of such residue as the Circuit

Court of the State of Oregon for Multnomah County might direct. (66).

The assets of Intermountain taken over by the Oregon Commissioner had cost Intermountain $578,472.70. (183). These assets had been purchased in part from money contributed by certificate holders in other states whose certificates contained the security clause. (184-5).

The District Court held that the security clause did not create a specific lien on the Oregon assets of Intermountain, that the proceedings in the District Court of Arizona was not a class action which could bind the Oregon Corporation Commissioner or Oregon certificate holders, that the Oregon law requiring deposits and giving a preference to Oregon certificate holders is constitutional, and that the Oregon Corporation Commissioner having first acquired jurisdiction over the Oregon assets the court would not appoint a receiver. (114-5). In its findings of fact the court found that Intermountain was "probably insolvent" at the time the Corporation Commissioner took over its assets. (112).

Plaintiffs appealed to the Circuit Court of Appeals, in part assigning as error the action of the court in holding the Oregon deposit and preference statute constitutional, in failing to give full faith and credit to the Arizona decision respecting the existence of a lien on the assets in favor of the holders of certificates containing the security clause, in hold-

ing that the Arizona suit was not a class action binding on the Oregon Commissioner or certificate holders, and in finding that the Oregon procedure for liquidation was adequate to protect all creditors. (265-272).

The Circuit Court of Appeals declined to pass upon the validity of the Oregon statute under which the two deposits of securities were made with the Oregon Commissioner and which creates a preference in favor of Oregon creditors, or on the effect of the fact that the statute was enacted after the Intermountain had been admitted to do business in Oregon and after substantially all its indebtedness to Oregon creditors had been created. It likewise declined to pass on the question of insolvency at the time the deposits were exacted, saying that all such matters could be presented to the Oregon courts in the process of liquidation by the Commissioner. Instead, it considered only one question, that of the adequacy of the liquidation proceedings provided by Section 60, Chapter 373, Oregon Laws 1931. (300-1). The court did, however, refer to Brashear v. Intermountain, 109 Fed. (2nd) 857, wherein the court held in respect to the California Building and Loan Commissioner liquidation of the same corporation that the Building and Loan Commissioner and the State Treasurer with whom the California securities were deposited were not similarly situated with the plaintiff certificate holders and so, whether the Arizona case was a class suit or not, the decision

there did not conclude the Commissioner and Treasurer and that all questions relating to claims, preferences, constitutionality of statutes and similar matters should be determined in the California liquidation proceedings.

In the Brashear case application is pending in this court for a writ of certiorari. Many of the questions involved in the present case are likewise present in the Brashear case. However, there are many important dissimilarities, fundamental in character, in the matter of the liquidation statutes, the diligence exercised by the Oregon Commissioner, and the relative dates of the Oregon preference statute and the creation of the obligations of the corporation to Oregon residents.

SPECIFICATIONS OF ERRORS

(1). The Circuit Court of Appeals erred in holding that Gallegos v. Intermountain Building & Loan Association (the Arizona case) together with the Findings of Fact and Conclusions of Law therein were not res adjudicata, binding on Oregon creditors and the Oregon Corporation Commissioner and entitled to full faith and credit in the Oregon courts under the provisions of Article I, Section 8, Article VI and Article IV, Section 1, of the United States Constitution.

(2). The Circuit Court of Appeals erred in deciding that it was unnecessary to determine the

rights of petitioners and others similarly situated and refusing to pass thereon.

(3). The Circuit Court of Appeals erred in holding that the Oregon procedure for liquidation and the action or lack of action of the Corporation Commissioner thereunder are adequate to protect the rights of nonresident creditors.

REASONS RELIED ON FOR GRANTING THE WRIT

POINT A:

In holding that the final decree, findings of fact and conclusions of law made by the United States District Court for the District of Arizona in Gallegos v. Intermountain Building & Loan Association were not res adjudicata and binding on Oregon creditors and the Oregon Corporation Commissioner and entitled to full faith and credit in Oregon, the Circuit Court of Appeals has decided an important question of Federal law in a way probably not in accord with applicable decisions of this Court.

POINT B:

In determining that petitioners were not entitled to a decision on their rights respecting the Oregon assets, the Circuit Court of Appeals has decided an important question of Federal law which appears not to have been and should be settled by this court.

POINT C:

In holding that it was unnecessary to determine whether the Oregon statute giving a preference to Oregon residents violates Article IV, Section 2, Article I, Section 10, and Article I, Section 8 of the Constitution and Section 1 of the Fourteenth Amendment thereto, the Circuit Court of Appeals has decided an important question of Federal law probably in conflict with applicable decisions of this court.

POINT D:

In deciding that the procedure provided by the Oregon statutes for liquidating building and loan associations and the action or lack of action thereunder are adequate to protect nonresident creditors, the Circuit Court of Appeals has decided an important question of Federal law in a way probably in conflict with applicable decisions of this court.

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

POINT A.

In holding that the final decree, Findings of Fact and Conclusions of Law made by the United States District Court for the District of Arizona in Gallegos v. Intermountain Building & Loan Association were not res adjudicata and binding on Oregon creditors and the Ore-

gon Corporation Commissioner and entitled to full faith and credit in Oregon, the Circuit Court of Appeals has decided an important question of Federal law in a way probably not in accord with applicable decisions of this court.

The opinion of the Circuit Court of Appeals does not discuss the effect of the Arizona decree other than to refer to Brashear v. Intermountain Building & Loan Association, 109 F. (2) 857 as a decision by the court on many of the questions raised in the present case. (299-300). The Brashear decision, Page 862, disposes of the Arizona suit by saying that while that suit "was or purported to be a class suit on behalf of named plaintiffs and others similarly situated . . . the situation of the Building and Loan Commissioner and the State Treasurer of California and the situation of the named plaintiffs in the Gallegos suit were not similar. Hence, the Commissioner and the Treasurer were not concluded or in any wise affected by any order or decree in the Gallegos suit or by anything done or said in that suit."

The Gallegos suit was without doubt a class suit. The Arizona District Court, on pleadings raising the issue, concluded that all Intermountain assets wherever situated were a trust to secure the obligations under the contract liens, that Intermountain was a trustee for that purpose, that all of its assets belonged in the possession of the receiver (119-123), and that the rights and title of the receiver related

back to the commencement of the suit, April 18, 1933. (123).

The Arizona case being a class suit, and all holders of certificates containing the security clause being similarly situated with the named plaintiffs, all such certificate holders were represented by the named plaintiffs. They all had a common interest in the common funds and the decree bound all of them. Hartford Life Insurance Co. v. Ibs, 237 U. S. 662, 35 S. Ct. 692, Supreme Council, etc. v. Green, 237 U. S. 531, 59 L. Ed. 1089, Sovereign Camp of Woodmen of the World v. Bolin, 305 U. S. 66, 83 L. Ed. 45, Smith v. Swormstedt, 16 How. 288, 14 L. Ed. 942, U. S. v. Old Settlers, 148 U. S. 427, 480, 13 Sup. Ct. 650; Sprague v. Ticonic Natl. Bank, 307 U. S. 161, 83 L. Ed. 1184.

The decree in such case is binding even on those whose presence as parties would have ousted the jurisdiction of the court. Supreme Tribe of Ben-Hur v. Cauble, 255 U. S. 356, 364-5, 41 S. Ct. 338, 341. The proper forum in which to question the validity of the decree is the court whose decree is claimed to be res adjudicata regardless of any public policy of the state where the decree is sought to be enforced. Roche v. McDonald, 275 U. S. 449, 455; 48 S. Ct. 142, 144.

The findings of fact, conclusions of law and decree were also entitled to full faith and credit under Article I, Section 8, Article VI and Article IV

of the Constitution. Embry v. Palmer, 107 U. S. 3, 9; Stoll v. Gottlieb, 305 U. S. 165, 59 S. Ct. 134, 137.

The distinction made by the Circuit Court of Appeals in the Brashear case between the Building and Loan Commissioner and the State Treasurer on the one hand and the certificate holders on the other seems to be without foundation. Neither the Commissioner nor the Treasurer has any personal interest in the liquidation. Their rights can be no greater than those of the creditors for whom they act. The full faith and credit clause of the Constitution and the doctrine of res adjudicata would be nullified if a mere nominal change in parties without substantial difference in interest prevented their application. Throckmorton v. Hickman, 279 F. (C. C. A. 3) 196, 201.

The title to securities deposited with the Oregon Commissioner was not changed by the deposit, U. S. v. Knott, 298 U. S. 544, 80 L. Ed. 1321. Therefore, when Intermountain answered in the original suit, the District Court of Arizona had jurisdiction of the parties and the subject matter, and had power to make the final decree which it did make adjudging the rights of all who were represented in the suit in the properties of the corporation.

POINT B.

In determining that petitioners were not entitled to a decision on their rights respecting the Oregon assets, the Circuit Court of Appeals has decided an important question of Federal law which appears not to have been, and should be, settled by this court.

An inspection of the complaint in this case discloses that its primary object was to secure a decree establishing a lien in favor of plaintiffs and others similarly situated upon all Intermountain real estate mortgages held or owned in Oregon, all real estate owned by the corporation in Oregon, and all assets in the hands of the State Corporation Commissioner. (38-39). The prayer for appointment of ancillary receivers and for an order to require the Corporation Commissioner to deliver all the assets in his possession to these receivers was only incidental to the main purpose of the suit. The real object of the suit was to defeat any preference in favor of the Oregon creditors.

It will be seen later in the discussion of the Oregon statutes relating to liquidation of similar associations that such proceedings are commenced by the publication of a notice requesting claimants to present their claims and the mailing of such notice to all persons appearing on the books of the corporation as creditors, shareholders, members or investors. No such notice had been published or mailed at the time of the trial of this cause in the District

Court and the record is silent as to whether any such action has since been taken.

It would seem therefore that as a matter of justice that petitioners are entitled to a determination of their rights in the court to which they resorted, regardless of whether a state liquidation is started or allowed to proceed. It has been held in a similar case that a District Court not only has jurisdiction to determine the rights of litigants in funds being administered in a state court but that in an appropriate case it is its duty to do so. Commonwealth Trust Co. of Pittsburgh v. Bradford, 78 F. (2) 92 affirmed by this court in 297 U. S. 613, 56 S. Ct. 600.

That this is an appropriate case for the exercise of such jurisdiction is demonstrated by the Commonwealth Trust case just cited, and Clark v. Darr (Ind.), 80 N. E. 19, 9 L. R. A. (N. S.) 460; Blake v. McClung, 172 U. S. 239, 43 L. Ed. 432; Torrington Co. v. Sidway-Topliff Co. (C. C. A. 7th) 70 F. (2) 949.

POINT C.

In holding that it was unnecessary to determine whether the Oregon statute giving a preference to Oregon residents violates Article IV, Section 2, Article I, Section 10, and Article I, Section 8 of the Constitution and Section 1 of the Fourteenth Amendment thereto, the Circuit Court of Appeals has decided an important question of Federal law probably in conflict with applicable decisions of this court.

Whatever conclusion may be reached as to the

rights, if any, of the petitioners and others similarly situated, as respects assets in Oregon, there is no doubt but that those rights are substantially affected by the attempt of the Oregon Corporation Commissioner to give a preference to Oregon residents. Petitioners and others similarly situated had a contract by which Intermountain agreed to hold its mortgages (necessarily including its Oregon assets, because it did not have sufficient elsewhere) as security for its promises to them. This contract is being impaired by the Oregon legislation which directly contravenes the doctrine announced by this court in Treigle v. Acme Homestead Assn., 297 U. S. 189, 80 L. Ed. 575. Petitioners were entitled to a decision of this court as to their rights. Commonwealth Trust Co. of Pittsburgh v. Bradford, 78 F. (2) 92, 297 U. S. 613, 56 S. Ct. 600. At least up to the time of trial of this cause, no other forum was available to petitioners because liquidation had not been commenced by the Oregon Commissioner.

POINT D.

In deciding that the procedure provided by the Oregon statutes for liquidating building and loan associations is adequate to protect nonresident creditors, the Circuit Court of Appeals has decided an important question of Federal law in a way probably in conflict with applicable decisions of this court.

The Corporation Commissioner in his Answer (48) gives as his authority for taking possession of

Intermountain assets, Section 57 of Chapter 373, Oregon Laws 1931, Section (25-398, Oregon Laws Ann. 1935 Supp.) which provides that the Commissioner, when he deems the capital of an association impaired, may take possession of its assets and operate it or return it to its members, or if he deems it advisable, "liquidate as elsewhere provided in this act."

The provisions relating to liquidation are found in Section 25-3,101 of the same supplement to the code. That section is set out in full in the appendix. Its main features are these:

The Commissioner shall first prepare a complete statement of the assets of the association and shall then cause "due notice to be given by publication for four successive weeks . . . requesting all persons having claims . . . to present them . . . at a place and within a time to be designated in such notice and he shall cause a copy of such notice to be mailed to all persons whose names appear of record upon its books. . . ." On the expiration of the time fixed, the Commissioner shall prepare a schedule of claims "specifying by classes those that have been approved and those that have been disapproved." "Claims that are rejected shall be so marked with the date of such rejection and within ten (10) days thereafter notice thereof shall be mailed to all claimants whose claims have been so rejected. Action to enforce payment of any rejected claim must be filed . . . within thirty (30) days from and after the date of such notice; otherwise all such actions shall for-

ever be barred." After paying his expenses the Commissioner "shall distribute and pay dividends in liquidation . . . as soon as funds are available . . . until all the assets have been realized upon a final dividend in liquidation shall be declared and paid."

Provision is made for filing of a final account and objections thereto, but only after final distribution. The act also directs the Commissioner to apply to the Circuit Court for an order confirming any action theretofore taken by him and to apply for instructions, and further provides that said court shall have power "on petition of the Corporation Commissioner and notice to all persons affected thereby to declare the rights, status and other legal relations of all persons interested as debtor, creditor or member of such association."

It will be observed of these provisions that no resort to a court is necessary until after liquidation is under way and then the first application is for confirmation of matters done; that there is no minimum period of notice required to be given to creditors and certificate holders, that matter being left entirely to the Commissioner's discretion except as that discretion may be said to be qualified by the words "due notice"; that claims may be classified, thereby permitting preferences to be given to some without rejecting those given a lower classification, with no provision for notice of the classifications adopted; that individual action must be brought on a rejected claim within thirty days; there being no

provision for a class suit to determine the rights of all in a class; and that, if individual action is not brought within thirty days, the claim is forever barred; if, therefore, putting a claim into a lower classification may be considered a rejection of the claim, each person given the lower classification must bring action within thirty days, there being no provision in this statute, as there is in various other statutes, that certificate holders whose claims appear on the books may be entitled to share pro rata without filing a claim or bringing action.

If it is argued that the Corporation Commission may bring a suit to determine the rights of all certificate holders, the time of bringing the suit is not fixed and the statute itself would bar all claims that have been rejected unless action is brought thereon within thirty days after the rejection. Therefore, the within thirty days after the notice of rejection. Therefore, the suit to determine rights must be brought and determined prior to the expiration of the thirty day period.

It was said by this court in Roller v. Holly, 176 U. S. 398, that the right of the citizen to due process of law "must rest upon a basis more substantial than favor or discretion." In Coe v. Armour Fertilizer Works, 237 U. S. 413, 424, this Court said: "Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires." In Wuchter v. Pizzutti, 276

U. S. 13, the Court said that provisions for reasonable notice must be contained in the statutes themselves.

When it is recalled that there were 3840 claimants with an average investment of a fraction under $750.00 residing for the most part in six states (272 claimants lived outside these six states) it is plain that to require each claimant to bring an action at law in each of the six states to insure his receiving his fair share of the assets would leave him with no practical remedy. Certainly such a remedy could not be called adequate.

Without going outside the record it cannot be said whether the Corporation Commissioner has ever taken any of the three steps which the statute commands as the start of liquidation—the preparation of the statement of assets of the association, the publication of notice to creditors, or the mailing of copies of the published notice to creditors. The record does show that none of these steps had been taken up to the time of trial in 1937 (143-5). Therefore, no notice had been given to the certificate holders, no opportunity had been offered to them to present their claims in any Oregon liquidation, and they are without any remedy, unless a remedy is available to them in this suit.

The Oregon Commissioner's examiner made five examinations of the condition of Intermountain in 1927, 1928, 1929, 1932 and 1933. In September, 1933, his examination disclosed that the association's condition was "very, very bad." (243). The conditions he found had not developed in a day and part of it

covered a long period of time. (243). He knew that there were various suits pending against Intermountain. (241-2). The condition of Intermountain had been discussed by the Building & Loan Commissioners of various states as early as August, 1933. (211). The only action the Commissioner took was to require the two deposits in September and October, 1933, previously referred to, thereby undertaking to secure a preference for the Oregon residents, until March, 1934. (143). The Oregon Commissioner then took possession of the Oregon assets and began operation of the company's affairs in Oregon, but did not undertake its liquidation.

This inaction of the Oregon Commissioner is comparable with that of the Utah Bank Commissioner which the Arizona District Court and the Circuit Court of Appeals said justified taking the liquidation out of the Utah Commissioner's hands and placing it in the hands of the Arizona receiver—a decision as to which this court refused certiorari.

Respectfully submitted,

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APPENDIX

OREGON LIQUIDATION STATUTE

Oregon Laws 1935, Chapter 176, Section 60, (Oregon Code Ann. 1935 Supp. Section 25-3,101):

"During the possession of and pending the process of liquidation of a savings and loan association by the corporation commissioner, as herein provided, no attachment or execution shall be levied or lien created upon any of the property of such association. In liquidating a savings and loan association, as in this act provided, the corporation commissioner shall first prepare a complete statement of the assets of the association. He shall then cause due notice to be given by publication, for four successive weeks, in some newspaper published at or near the principal place of business of such association, requesting all persons having claims against it as creditors, shareholders, members or investors, to present same and make legal proof thereof, at a place and within a time to be designated in such notice, and he shall cause a copy of such notice to be mailed to all persons whose names appear of record, upon its books as creditors, shareholders, members or investors; and, upon the expiration of the time fixed for the presentation of claims, the corporation commissioner shall prepare or cause to be prepared a full and complete schedule of all claims presented, specifying by classes those that

have been approved and those that have been disapproved, and file in the offices of the corporation commissioner. Claims that are rejected shall be so marked with the date of such rejection and, within 10 days thereafter, notice thereof shall be mailed to all claimants whose claims have been so rejected. Action to enforce payment of any rejected claim must be filed in a court having jurisdiction thereof in the county in which the principal office of said association is located, within 30 days from and after the date of such notice; otherwise all such actions shall forever be barred. The corporation commissioner may, under his hand and official seal, appoint one or more examiners to assist in the duties of liquidation and distribution, under his direction, and also may employ such counsel and clerical assistance as may be needful and requisite, and fix reasonable salaries and compensation to be allowed and paid to each. All such salaries, together with such other reasonable and necessary expenses as may be incurred in the liquidation, shall be paid by him from the funds of such association in his hands, and from the net realization of assets, in excess of such salaries and expenses, the corporation commissioner shall first pay all approved claims of creditors, and thereafter he shall distribute and pay dividends, in liquidation, to the shareholders other than reserve fund, as soon as funds are available therefor, and so continue until all the assets have been realized upon a final dividend in liquidation

shall be declared and paid. Upon the payment of a final dividend in liquidation, the corporation commissioner shall prepare and file in his office a full and final statement of the liquidation, including a summary of the receipts and disbursements. The directors, stockholders or any interested party thereupon shall have 30 days in which to file with the circuit court of the county in which the principal office of the association is located, any objections to said final report and account. Any objections not so filed forever shall be barred. After said filed objections, if any, have been finally disposed of by the court, the liquidation shall be deemed closed, except for an accounting to the reserve fund stockholders, if any.

The corporation commissioner may deposit with the state treasurer of the State of Oregon such unclaimed dividends and funds of a domestic savings and loan association, the assets of which have been liquidated, remaining in his hands at any time after six months following the order for final distribution. Said funds shall thereupon escheat to and become the property of the state of Oregon and shall be paid into and become a part of the common school fund of the state. The owner, his or her heirs or personal representatives, may reclaim any funds so deposited within the time and in the manner as provided for estates which have escheated to the state. The interest earned on any such dividend accounts while they remain in the possession of the corpora-

tion commissioner may be applied to defray the expenses of payment and distribution of such dividends and the owner, his or her heirs or personal representative, shall have no claim thereto.

Where any files, records, documents, books of account or other papers have been taken over and are in possession of the corporation commissioner in connection with the receivership of any savings and loan association under the laws of this state the corporation commissioner may, in his discretion, at any time after the expiration of six years from the declaration of the final dividend, or from the date when such receivership has by order of the court been declared closed, destroy any of the files, records, documents, books of account or other papers which may appear to the corporation commissioner to be obsolete or unnecessary for future reference as part of the files of his office.

Upon taking possession of the property and business of any savings and loan association, either for the purpose of operating or liquidation, the corporation commissioner:

1. Shall apply to the circuit court in and for the judicial district in which the principal office of the savings and loan association shall be located, for an order confirming any action theretofore taken by him or authorizing him to do any act or execute any instrument, not expressly authorized by this act, which order shall be made and entered only after

a hearing and upon such notice as the court shall prescribe.

2. Shall apply to said circuit court for instructions or directions relating to the claims of creditors and rights of members and to such other matters affecting the interests of said association, its members and creditors, and for such purpose the said circuit court shall have original jurisdiction in equity of all proceedings growing out of the operation or liquidation by the corporation commissioner of said associations, pursuant to the provisions of this act, with power in said court on petition of the corporation commissioner, and notice to all persons affected thereby, to declare the rights, status and other legal relations of all persons interested as debtor, creditor, or member of such association.

3. Shall disaffirm, within 60 days after taking such possession, any executory contracts, including leases, to which such association shall be a party, and may disaffirm any partially executed contracts, including leases, to the extent that they shall remain executory.

Upon taking possession of the properties and business of any savings and loan association, either for the purpose of operation or liquidation, the corporation commissioner is authorized to do and perform such acts as may be deemed necessary to preserve and protect its assets and business, and, upon

the order of the circuit court in and for the judicial district in which the principal office of such association was located, may sell, settle, compromise or compound any bad or doubtful debts, claims or obligations owing to or by the association, and, on like order, may sell, exchange or otherwise dispose of any of the real estate or other property of such association, or may transfer, sell or otherwise dispose in whole or in part, its assets, engagements, funds and property on such terms as the court shall direct and, upon the terms of sale, exchange, compromise or settlement directed by the court, shall make, execute and deliver such deeds or other instruments in writing as shall be deemed necessary to evidence the passing of the title, and, upon payment in full of any mortgage owing to the association may, without any such order of court make, execute and deliver such instrument or instruments in writing as may be deemed necessary to satisfy and discharge the same of record, and any instrument executed pursuant to the authority hereby given, shall be valid and effectual for all purposes, as though the same had been executed by the officers of such association by authority of its board of directors. If any real estate of the association so sold, exchanged or otherwise disposed of is situated outside the county in which the principal office of the association was located, a certified copy of the order of court authorizing the sale, exchange or disposition thereof shall be filed in the office of the county

clerk or recorder of conveyances of the county in which such real property is situated.

The corporation commissioner may, after he has taken possession of the property and business of a domestic or foreign savings and loan association, apply to the circuit court of the county in which the receivership proceedings are pending, for an order directing him to cause any safe, safety vault or safety deposit box held by such association (whether it is upon the premises of such association or elsewhere located) to be thereafter opened in his presence or in the presence of an examiner and in the presence of a notary public not an officer of, or in the employ of, such savings and loan association, or of the corporation department and an officer of said association if available, and the contents, if any, listed; one signed copy to be delivered to the corporation commissioner, and a second signed copy to be retained by such notary public, and a third signed copy to go to said officer of the corporation, and the contents to be enclosed in a container which is to be distinctly marked by such notary public and delivered to the corporation commissioner. The container shall be kept by the corporation commissioner in his custody and control for use in the administration of the affairs of the savings and loan association, as provided by law. Such contents shall be held subject to the payment of any rent that may be unpaid for the use of such safe, safety vault, or safety

deposit box, and also any expenses incurred in opening the safe, vault or box, and also reasonable compensation for the safe keeping of the contents after their removal from the safe, vault or box.

Any suits or actions by or against or on behalf of any association in the possession of the corporation commissioner shall, if by the association, be instituted by the corporation commissioner, in his official capacity as statutory receiver of the association, and if against the association, shall be against such corporation commissioner as statutory receiver thereof, any pending suits or actions by or against or on behalf of the association to be continued only by and in the name of or against such corporation commissioner in his official capacity.

Wherever the corporation commissioner has heretofore taken possession of any savings and loan association for purpose of operation or liquidation, in the exercise of his power and authority under the provisions of the savings and loan laws of this state, all deeds, bills of sale, satisfactions of mortgages, assignments, conveyances, transfers, or other instruments, which have heretofore been, or which shall hereafter be executed, acknowledged and delivered in good faith and for valuable consideration, by the corporation commissioner or the savings and loan supervisor, or any duly appointed deputy of said corporation commissioner, on behalf of such association, hereby are validated, ratified, confirm-

ed and declared to be legal and entitled to record, and they shall have the same binding force and effect upon all parties affected thereby, and upon all rights affected thereunder, as though said instruments had been executed by the officers of said associations, by authority of its board of directors.

Statute under which Oregon Commissioner took possession, Oregon Laws 1931, Chapter 373, Section 57 (Oregon Code, Ann. 1935 Supp. Section 25-398):

"Whenever it shall appear to the corporation commissioner that the capital of a savings and loan association is impaired, or that its affairs are in an unsafe condition or that it is conducting its business in an unsafe or unlawful manner, the corporation commissioner may direct the supervisor of savings and loan associations to take possession of all books, records and assets of every description of such association and hold and retain the possession of same pending the further proceedings herein specified. Should the board of directors, secretary or person in charge of such association refuse to permit the said supervisor to take possession as aforesaid, the corporation commissioner shall communicate such fact to the attorney general, whereupon it shall become the duty of the attorney general at once to institute such proceedings as may be necessary to place such supervisor in immediate possession of the property of such association. Upon taking possession of the effects of the association as aforesaid said supervisor shall prepare a full and true statement of the affairs and condition of such association, including an itemized statement of its assets and liabilities, and shall receive and collect all debts, dues, payments and claims belonging to it and pay the immediate and reasonable expenses of his trust. Such

supervisor or deputy in charge shall be required to execute to the corporation commissioner a good and sufficient bond in a sum required by the corporation commissioner conditioned upon the faithful discharge of his duties as custodian of such association, which said bond shall be approved by the corporation commissioner, and the expenses of which shall be borne by the association under examination.

When the condition of such association has been fully ascertained, and it shall appear to the corporation commissioner that the affairs of said association are in fact in an unsafe condition, the corporation commissioner shall at once notify in writing the board of directors of such association of his decision, giving them 20 days in which to restore the affairs of such association to a safe condition. Meanwhile, the supervisor shall remain in charge of the books, records and assets of every description of such association, attend or be represented at all directors' and stockholders' meetings held, and suggest such steps as he may deem necessary to restore such association to a safe condition; and if same is not done within the 20 days allowed by the statute he shall report the facts to the corporation commissioner, who shall take full possession of the properties and business of such association and may, if he deems advisable, proceed to liquidate as elsewhere provided in this act, subject, however, to the right of the directors to apply to the circuit court of

the county where the principal office of the association is located, as provided in Section 52 of this act, to restrain the corporation commissioner from such procedure.

If, upon final hearing in said court the acts of the corporation commissioner shall be disapproved by the court, the corporation commissioner shall cause all reasonable expenses incurred by him during his occupancy or possession, including not exceeding $10.00 per diem, for each business day, as the compensation of the custodian, to be paid from the funds of such association and restore the balance of the property and assets thereof to the possession of the proper officers of said association."

Oregon Preference Statute:

Oregon Laws 1931, Chapter 373, Section 63: (Oregon Code Ann. 1935 Supp. Section 25-3,104):

"No certificate of authority shall be issued to a foreign savings and loan association by the corporation commissioner until the said corporation commissioner shall be satisfied that the requirements of this law have been fully met by such association. Before such certificate of authority shall be issued, such foreign savings and loan association shall comply with the following provisions:

. . . . . .

3. It shall deposit with the corporation commissioner $100,000 in cash or bonds of the United States, or bonds of any state of the United States, or bonds of any county or municipal corporation in the state of Oregon, or mortgages on improved Oregon real estate of a character acceptable for investment by an association governed by this act, all of which securities shall be approved in advance by the corporation commissioner. The corporation commissioner shall have authority to require such association to deposit additional securities, and to order a change in all of the securities so deposited, at any time. Such deposit shall be held as security until all claims of residents of this state shall have been fully redeemed and paid off and its contracts and obligations to residents of this state have been fully performed and discharged."